United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

NO. 74-1471

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTHONY E. LIPANI, Plaintiff-Appellant

v.

BOHACK CORPORATION, Defendant-Appellee

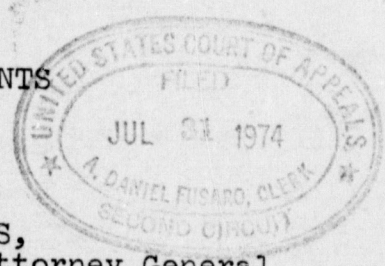
ROBERT LOESCH, Plaintiff-Appellant

v.

BOHACK CORPORATION, Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFFS-APPELLANTS



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QUESTION PRESENTED

Whether appellants -- returning veterans -- were entitled as a perquisite of seniority under 50 U.S.C. App. 459 to credit by their employer for their military service in the calculation of vacation and sick pay.

STATEMENT OF THE CASE

This case brings before this Court the issue of whether plaintiffs' vacation and sick leave benefits are perquisites of seniority protected under the veterans reemployment provisions of the Military Selective Service Act, 50 U.S.C. App. 459.

The basic facts of this case are stipulated (App. 31a, 47a). Appellant Anthony E. Lipani worked for the Bohack Corporation from May 6, 1969 until July 14, 1969, when he entered the military. He was reemployed by Bohack on October 18, 1971 and

has worked continuously since that date. He received no vacation or sick leave allowance in 1971. Had he not left his employment to serve his country, he would have received at that time, under the governing collective bargaining agreement, two weeks of paid vacation and ten days of sick leave.[1/]

Appellant Robert Loesch was employed by the Bohack Corporation on March 10, 1969 and worked until July 31, 1969, when he left to fulfill his military obligation. He was reemployed by Bohack on October 18, 1971 and has also worked continuously since that date. In December 1971 he received one week paid vacation. Had he not left his employment to serve his country, he would have received at that time, under the governing collective bargaining agreement, two weeks paid vacation and 10 days of sick leave.[2/]

With respect to vacation pay, the collective bargaining agreement provides that workers employed by Bohack "for a period of six (6) months of continuous working service" accrue one week of paid vacation. Workers employed for twelve months or more accrue two weeks of paid vacation and ten days of sick leave. After five years of employment a worker accrues a third week of paid vacation; after ten years a fourth week of paid vacation is accrued; and after twenty-five years a worker is entitled to five weeks of paid vacation (Article X, para. (A) (App. 6a)). Time not worked by an employee because of illness

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1/ He received his first two weeks vacation and ten days of sick leave credit in June 1972.

2/ In June 1972 Loesch received a two-week paid vacation, plus ten days sick leave allowance.

is treated as time worked for the purpose of computing vacation benefits, provided the employee "has worked a minimum of thirty (30) days during the year." (id., para. I).

The collective bargaining agreement provides, concerning sick leave, that employees who have "completed at least one (1) calendar year of employment" receive ten days of sick leave in each calendar year, five days of which may be taken as vacation time. Employees with less than one calendar year of employment on January 1st of any year receive sick leave benefits on a pro rata basis (Art. XII, para. (A) (App. 14a)).

Lipani and Loesch brought individual actions in the United States District Court for the Eastern District of New York pursuant to the Military Selective Service Act, 50 U.S.C. App. 459, to recover vacation and sick leave benefits for 1971, the year they returned from military service.[3/] The gravamen of the complaints was that, under the collective bargaining agreement, vacation and sick leave benefits accrue with the passage of time and therefore are seniority rights toward which a veteran is entitled to count his time in military service. Lipani sought to recover two weeks vacation pay for 1971 and proper sick leave credit for that year. Loesch sought to recover an additional week's vacation for 1971 and proper sick leave credit for that year.

The actions were consolidated and came to be heard on cross motions for summary judgment. Plaintiffs contended that

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3/ The Government is representing Mr. Lipani and Mr. Loesch in this litigation pursuant to 50 U.S.C. App. 459(d).

since they had been "in the employ of the Company for twelve (12) months or more," as provided in the collective bargaining agreement, they were entitled to two weeks vacation to be taken in calendar year 1971. Similarly, plaintiffs contended that having "completed at least one (1) calendar year of employment," as provided in the collective bargaining agreement, they were entitled to be credited with the proper amount of sick leave allowance in 1971.

On December 21, 1973, the district court, Bartels, J., granted judgment on behalf of the Bohack Corporation, holding that the relevant provisions of the collective bargaining agreement contained a bona fide work requirement which had not been met by appellants (368 F. Supp. 282, E.D. N.Y., 1973). "The pertinent portions of the collective bargaining agreement * * * clearly indicate * * * that employees were entitled to vacation pay and sick leave allowance earned during the year predicated upon work and not by the mere passage of time."

This appeal followed.

STATUTE AND COLLECTIVE BARGAINING AGREEMENT INVOLVED

Section 9 of the Military Selective Service Act, 50 U.S.C. App. 459, provides in relevant part:

* * * *

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position * * * and * * * makes application for reemployment within ninety days after he is relieved from such training and service * * * --

* * * *

(B) if such position was in the employ of a private employer, such person shall --

(i) if still qualified to perform the duties of such position, be restored by such employer * * * to such position or to a position of like seniority, status, and pay;

* * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

The relevant provisions of the collective bargaining agreement are:

Article X - Vacations

(A) All full time employees in the employ of the Company for a period of six (6) months of continuous working service shall receive one (1) week's vacation with pay. Employees in the employ of the Company for twelve (12) months or more shall receive two (2) weeks vacation with pay and one (1) week's scheduled sick leave as defined in Article XII (A). Employees in the employ of the Company five (5) years or more shall be entitled to a third week's vacation. Employees in the employ of the

Company ten years (10) or more shall be entitled to a fourth week's vacation. Employees in the employ of the Company twenty-five (25) years or more shall be entitled to a fifth week's vacation.

No employee shall receive a vacation with pay in any one calendar year in excess of the vacation period to which he is entitled above.

(B) Vacation pay shall be computed on the basis of the employees regular straight time weekly earnings including all premiums, if any.

Night shift premiums shall be included in vacation pay only if such employees regularly worked on night shift immediately preceding their vacations, regardless of time on shift. This shall not apply to regular night shift employees who temporarily replace day shift employees due to vacations, illness, jury duty or death in family.

* * * *

(E) Vacations shall be given in consecutive weeks within the April 1st - September 30th vacation period.

(F) Any employee entitled to a vacation who is laid off for lack of work without receiving his vacation shall receive whatever vacation pay and sick leave which has been earned in the past year plus vacation pay and sick leave pro-rated on the basis of the period worked during the year of said interruption of employment.

* * * *

(H) Any worker who shall complete a full year shall receive his two weeks vacation in that year, and one (1) week sick leave, or more, if eligible under the provisions of this Contract. Vacations shall be selected on straight seniority disregarding job classifications, with the exception of hilo mechanics who shall select vacations within their own classification.

(I) Time not worked by an employee because of illness shall be considered time worked for the purpose of computing the vacation of such employee, provided such employee has worked a minimum of thirty (30) days during the year.

(J) Employees unable to work in a new year because of illness shall be paid vacation monies earned during the preceding year on a pro-rated basis. If any such employee becomes deceased, said monies shall be paid to the heir of the deceased employee.

* * * *

Article XII - Sick Leave -- Absenteeism

(A) The Company agrees to grant ten (10) days of sick leave in each calendar year for those employees who have completed at least one (1) calendar year of employment. For those employees who have less than one (1) calendar year of employment as of January 1st of any year, sick leave shall be pro rata until the beginning of the following calendar year. For those eligible for ten (10) days sick leave in each calendar year, five (5) of the ten (10) days may be taken as vacation, outside of the vacation period. The remaining five (5) days can only be taken as regular sick leave.

* * * *

ARGUMENT

I

PLAINTIFFS' VACATION BENEFITS ARE PERQUISITES OF SENIORITY WHICH THEY ARE ENTITLED TO RECEIVE PURSUANT TO THE MILITARY SELECTIVE SERVICE ACT.

Summary.

The principal question before this Court is whether vacation benefits are seniority rights protected under the veterans reemployment provisions of the Military Selective Service Act (hereafter, "Act"). If such benefits are seniority rights, then appellee, in computing vacation pay, must include in its calculations the period spent by returning veterans in the military service.

Under Accardi v. Pennsylvania Railroad Co., 383 U.S. 225 (1965), which has been interpreted by this Court in Palmarozzo

v. Coca-Cola Bottling Co. of New York, Inc., 490 F. 2d 586 (C.A. 2, 1973), certiorari denied, ___ U.S. ___ (June 10, 1974), the initial inquiry is to determine the "real nature" of the benefit at issue. Should this inquiry not prove dispositive, Accardi counsels an examination of the particular plan in question to determine if the benefit is conditioned on length of employment. If so conditioned, it is a perquisite of seniority and protected by the Act.

Under the tests of Accardi, plaintiffs here are entitled to the relief sought. Many courts have held that the "real nature" of vacation benefits is that they inherently constitute a perquisite of seniority. Furthermore, the plain language and bizarre results possible under the collective bargaining agreement here dictate a finding that vacation benefits accrue simply by virtue of continuous employment. Thus, Accardi compels the conclusion that the vacation benefits here are perquisites of seniority, and plaintiffs are entitled to have their military service counted in the computation of these rights.

A. The Accardi tests.

Since 1940, Congress, as an integral part of selective service legislation, has protected the reemployment rights of veterans. Section 9(c)(1) of the Military Selective Service Act, 50 U.S.C. App. 459, provides that a returning veteran shall be restored to his former position or "to a position of like seniority, status, and pay," and he shall be so restored "without loss of seniority." Section 9(c)(2)

provides that he shall be restored "in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 4/

The basic principle underlying this legislation is that he who is "called to the colors [is] not to be penalized on his return by reason of his absence from his civilian job" (Tilton v. Missouri Pacific R.R. Co., 376 U.S. 169, 170-171 (1964); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946)). The Act "is to be liberally construed for the benefit of those who left private life to serve their country" (Palmarozzo v. Coca Cola Bottling Co. of New York, Inc., supra, at 592). Returning veterans are "entitled by the Act to be restored not to a position which would be the precise equivalent of that which [they] had left when [they] joined the Armed Forces, but rather tc a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which [they] would have held if [they] had remained continuously in [their] civilian employment" (Oakley v. Louisville & Nashville Ry. Co., 338 U.S. 278, 283 (1949); Tilton v. Missouri Pacific R.R. Co., supra, 376 U.S. at 175).

4/ Section 9(c)(2), added in 1948, represents a codification of the law established by cases such as Fishgold v. Sullivan Drydock & Repair Corp., supra. See also Tilton v. Missouri Pacific Ry. Co., 376 U.S. 169 (1964).

The Supreme Court has consistently adhered to the position that a veteran is not to be penalized by his period of military service, and that he is entitled to all seniority rights which would have accrued to him had he remained on his employer's payroll instead of entering military service. See, e.g., Accardi v. Pennsylvania Railroad Co., supra (severance pay); Eagar v. Magma Copper Co., 389 U.S. 323, reversing per curiam, 380 F. 2d 318 (C.A. 9) (vacation pay); Tilton v. Missouri Pacific R.R. Co., supra (promotion); Brooks v. Missouri Pacific R.R. Co., 376 U.S. 182 (promotion). The Supreme Court made it clear in Accardi that if a right constitutes a "seniority" right it cannot be limited by the "other benefits" clause of the statute. 5/ That clause "was intended to add certain protections to the veteran and not to take away those which are granted him" elsewhere in the Act. 383 U.S. at 232. The question of plaintiffs' right to vacation benefits thus turns on whether they constitute seniority rights within the meaning of the statute.

5/ The "other benefits" clause of 50 U.S.C. App. 459(c)(1) provides:

> (c) Service considered as furlough or leave of absence
>
> (1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) [of this section] shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. [emphasis supplied]

The controlling principles as to what constitutes seniority were established by the Supreme Court's decision in Accardi v. Pennsylvania Railroad Co., supra. In Accardi, the Supreme Court was presented with the question whether veterans were entitled to credit for the time spent in military service in the computation of the amount of severance allowance due them when the railroad eliminated their jobs as firemen. In holding that amount of severance pay constituted a seniority right protected by the Act, the Court observed that "[t]he term 'seniority' is not to be limited by a narrow, technical definition but must be given a meaning that is consonant with the intention of Congress as expressed in the 1940 Act. That intention was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country." 383 U.S. at 229-230.

The Court then proceeded to utilize two tests for determining whether a particular benefit qualifies as a perquisite of seniority. The Court examined the formula of the particular plan in question to determine if the bargaining agreement itself conditioned the benefits primarily on length of employment:

> In this case there can be no doubt that the amounts of the severance payments were based primarily on the employees' length of service with the railroad. The railroad contends,

> however, that the allowances were not based on seniority, but on the actual total service rendered by the employee. This is hardly consistent with the bizarre results possible under the definition of 'compensated service.' As the Government points out, it is possible under the agreement for an employee to receive credit for a whole year of 'compensated service' by working a mere seven days. There would be no distinction whatever between the man who worked one day a month for seven months and the man who worked 365 days in a year. 383 U.S. 230.

The Court also examined the "real nature" of the benefits:

> The use of the label 'compensated service' cannot obscure the fact that the real nature of these payments was compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past -- no matter how calculated -- but by the rights and benefits he forfeits by giving up his job. Among employees who worked at the same jobs in the same craft and class the number and value of the rights and benefits increase in proportion to the amount of seniority, and it is only natural that those with the most seniority should receive the highest allowances since they were giving up more rights and benefits than those with less seniority. The requirements of the 1940 Act are not satisfied by giving returning veterans seniority in some general abstract sense and then denying them the perquisites and benefits that flow from it. * * * Id.

The Court's analysis thus indicates that by either test it may be determined that a right constitutes a seniority right.

Accardi was recently interpreted by this Circuit in Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc., supra. There the employer, Coca-Cola, refused to include in its calculation of "service credits" for purposes of severance

pay the time spent in the military by an employee.[6/] Coca-Cola attempted to confine Accardi to the "bizarre results" produced by the collective bargaining agreement, arguing that the Accardi compensated service plan was a sham and could not control the merits in Coca-Cola's case because the formula of Coca-Cola's severance pay plan contained a work requirement. This Court, however, declared that Accardi counseled an examination in the first instance of the real nature of the benefits and that the "bizarre results" possible in Accardi under the collective bargaining agreement "illustrated that the compensated service benefits, despite pretensions to being equated to working time, were actually proportionate to length of service." 490 F. 2d 589. This Court proceeded to grant judgment on behalf of the veteran, holding that the "real nature" of severance benefits which accrue with years of service is payment for loss of seniority rights and not compensation; and that, as in Accardi, "length of continuous service, rather than the nature of that service, produced the benefits." 490 F. 2d 589.

This Court in Palmarozzo thus read Accardi to require, first, an inquiry into the "real nature" of the benefits at issue. Should the initial inquiry not be dispositive, then

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6/ Severance pay was available to any employee who terminated employment after accumulating five or more "service credits." An employee earned 1/4 of a service credit for each 400 hours actually worked. Overtime, however, was not included in these calculations and only one service credit could be earned in any given calendar year. Severance benefits increased with every five service credits.

there remains an examination of the particular formula of the collective bargaining agreement to determine if that agreement -- regardless of the labels used -- is a function of continuous employment or merely compensation for work performed. Applying the Accardi tests to the matter sub judice, we now show that under either of the Accardi tests the vacation benefits denied appellants are in fact perquisites of seniority and thus protected by the Act.

B. Application of the Accardi tests to this case.

1. The "real nature" of the benefits.

There is strong support in the case law for the position that, regardless of the particular provisions of the collective bargaining agreement, the "real nature" of vacation benefits is such that by their "real nature" they constitute perquisites of seniority. Approximately one month prior to the Supreme Court's decision in Accardi, the Ninth Circuit had ruled in Magma Copper Co. v. Eagar, 380 F. 2d 318 (1967), that vacation and holiday pay claimed by the veterans were not attributes of seniority. The collective bargaining agreement in Eagar provided vacations for employees who had worked 75 percent of the available shifts and who were on the payroll on the last day of the vacation year. It also provided holiday pay for employees who worked the day before and after the holiday and who were on the payroll for three continuous months prior to the holiday. The veterans in that case had not met the last day requirement for vacation pay or the three continuous months requirement for holiday pay. Without

analyzing the particular terms of the collective bargaining agreement, the Supreme Court summarily reversed the Ninth Circuit's decision, as contrary to Accardi (Eagar v. Magma Copper Co., 389 U.S. 323).

In Locaynia v. American Airlines, 457 F. 2d 1253 (C.A. 9, 1972), certiorari denied, 409 U.S. 982 (1972), without examining the particular provisions of the collective bargaining agreement, the Court of Appeals for the Ninth Circuit held that Eagar dictated the conclusion that vacation benefits ipso facto constitute perquisites of seniority. Thereafter, the Court of Appeals for the Seventh Circuit apparently followed Locaynia in sustaining a veteran's claims to vacation benefits. Ewert v. Wrought Washer Manufacturing Company, 477 F. 2d 128 (C.A. 7, 1973) (semble).

These decisions indicate that the real nature of vacation benefits is such that they constitute perquisites of seniority. Under these decisions, plaintiffs are clearly entitled here to the vacation pay they seek.

We recognize, however, that several courts of appeals which have considered the issue of vacation benefits have found the "real nature" of vacation benefits not to be conclusive. Instead, applying the alternative Accardi test, these courts have examined the particular collective bargaining agreement in question to determine whether the benefits accrued by virtue of continuous employment. E.g., Foster v. Dravo Corp., 490 F. 2d 55 (C.A. 3, 1973), petition for a writ

of certiorari pending, No. 73-1773, this Term (denying benefits); Kasmeier v. Chicago, Rock Island and Pacific R. Co., 437 F. 2d 151 (C.A. 10, 1971) (denying benefits); Morton v. Gulf, Mobile and Ohio R. Co., 405 F. 2d 415 (C.A. 8, 1969) (granting benefits); Hollman v. Pratt & Whitney Aircraft, 435 F. 2d 983 (C.A. 5, 1970) (granting benefits).[7/] As we now show, if this alternative test is followed, the particular vacation eligibility provisions at issue here reveals that these benefits are based on length of service, and not work actually performed, and are, therefore, perquisites of seniority protected by the Act.

2. The provisions of the collective bargaining agreement.

An examination of the collective bargaining agreement here establishes that the benefit in question accrues as a function of continuous employment, i.e., requires nothing more than mere presence at work. It was not awarded, as defendant contends, as compensation for work performed.

First, the plain language of the collective bargaining agreement indicates that the benefits at issue are functions of continuous employment. Article X, Section A of the agreement provides that one week of paid vacation is accrued after six months of "continuous working service" and that two weeks of paid vacation and ten days of sick leave are accrued after twelve months of such service. Five years of employment brings the employee three weeks of paid vacation;

7/ An examination of the particular bargaining agreement at issue was also made in Edwards v. Clinchfield R. Co., 408 F. 2d 5 (C.A. 6, 1969).

ten years of employment brings him four weeks of paid vacation; and a fifth week of vacation is accrued after twenty-five years of employment. It is, therefore, quite clear from the contract language itself that the length of paid vacation and sick leave depends upon seniority, for eligibility is keyed to "continuous working service."

Further, we have here the "bizarre results" similar to those which the Supreme Court found in Accardi, 383 U.S. at 230. Under the collective bargaining agreement here, an employee who has worked with the company for six months receives the same vacation as an employee who has worked with the company for eleven months.[8/] Moreover, the disparity is even greater when an employee is involved who has been ill. An employee who has worked for only 30 days -- and then been ill the remainder of the year -- can, through the operation of Art. X, paragraph (I), receive as much, or more, vacation credit than an employee who has worked, for instance, six, eleven, twelve, or more months.[9/] Certainly, these bizarre results destroy any contention that the vacation pay is a

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8/ Greater disparities appear with longer service. For instance, an employee with one year's employment receives the same vacation as an employee with just short of five years service.

9/ In Accardi, under the collective bargaining agreement, it was theoretically possible for an employee who worked only seven days a year to receive the same severance pay as an employee who worked 365 days. 383 U.S. at 230. Here, it is theoretically possible for an employee who worked only 30 days to receive the same vacation pay as one who worked 365 days.

form of compensation for actual work performed.

In Palmarozzo, this Court, although basing its decision upon the "real nature" test of Accardi, indicated that the same result would follow from an examination of the collective bargaining agreement. In that case, under the employer's severance pay plan, an employee received 1/4 of a service credit for every 400 hours actually worked during a year, but he could never acquire more than one credit per year, representing a total of 1600 hours worked. Severance credits increased with every five service credits, i.e., every five years. Coca-Cola contended "that its service plan was sufficiently related to the amount of time actually worked that the benefits were in the nature of compensation, as opposed to a seniority benefit." 490 F. 2d at 589. This Court rejected Coca-Cola's contention primarily upon its analysis of the "real nature" of severance pay. However, the Court indicated the same result would follow from an analysis of the collective bargaining agreement (490 F. 2d at 591, fn. 4):

> Even if Coca-Cola's 'service credit' plan were analyzed as it requests, the plan could not be considered a legitimate work requirement. The denial of any credit for overtime and the failure of the company to credit any hours in excess of 1600 per year show that this is a plan rewarding a continuous relationship with the company, rather than giving compensation for work actually performed. Also, the exact correlation between service credits and years of continuous employment as well as the increase in benefits with every five credits, or every five years, emphasize that the purported work requirements are just a crude means of measuring rewards for longevity.

Palmarozzo thus compels the conclusion that the plan here is not based on a "legitimate work requirement." Under the work requirement in Palmarozzo, an employee's credits (more accurately, quarter-credits) accrued with every 400 hours worked; the correlation with actual work performed is obviously greater than here, where credits accrue beginning at an interval of six months. Further, here, as in Palmarozzo, there is a periodic increase in benefits, indicating that the purpose of the arrangement is "a crude means of measuring rewards for longevity." The fact that under the plan here vacation rights are a perquisite of seniority follows a fortiorari from this Court's decision in Palmarozzo.

The district court relied upon the Tenth Circuit's decision in Kasmeier v. Chicago, Rock Island and Pacific R. Co., supra, for its erroneous conclusion that the collective bargaining agreement contained a bona fide work requirement. In Kasmeier, the court of appeals held that the employee had to satisfy the 110-day work requirement of the collective bargaining agreement before becoming eligible for vacation benefits. Palmarozzo, however, requires a much stricter correlation between work performed and accrual of the benefit than the Tenth Circuit held permissible in Kasmeier. Palmarozzo requires that in order for a benefit to be compensation for work performed instead of a perquisite of seniority, it must be clear that it is awarded for the purpose of compensating a worker for his actual personal service and its accrual must

vary directly and precisely with the units of work performed by each employee. The plan in Kasmeier would fail this test. Moreover, Kasmeier is factually distinguishable from this case because the "bizarre results" possible under the plan in Kasmeier are not nearly as extreme as those possible here.[10/]

In sum, the district court erred in its finding that the collective bargaining agreement contained a bona fide work requirement.[11/] The collective bargaining agreement, as that in Palmarozzo, does not contain "a legitimate work requirement." 490 F. 2d at 591, fn. 4. Rather, as in Palmarozzo, "this is a plan rewarding a continuous relationship with the company, rather than giving compensation for work actually performed." Id. The "purported work requirements

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10/ Under the Kasmeier collective bargaining agreement, the employee who worked 110 days during the previous calendar year and the employee who worked 365 days were treated the same. Here, the discrepancy is greater, however, since an employee who, because of illness, works only 30 days in a given year may receive the same vacation benefits as an employee who completes the year without absence.

11/ The district court erroneously believed that the paid vacation "provides a returning veteran with an advantage or priority not otherwise accorded non-veterans." 368 F. Supp. 282. Section 9(c)(2) of the Act expressly requires the employer to give the returning veteran "such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." Appellants seek no advantage over their fellow workers. They merely ask for the vacation time which would have been available to them had they remained continuously employed. The courts, including this one, have consistently awarded the perquisites of seniority to returning veterans in situations where non-veterans on leaves of absence were not accorded the same privilege of counting time not worked toward fulfillment of so-called "work-requirements." See, e.g., Hatton v. Tabard Press Corp., 406 F. 2d 593 (C.A. 2, 1969); Borges v. Art Steel Co., 246 F. 2d 735 (C.A. 2, 1957); Power v. Northern Illinois Gas Co., 388 F. 2d 427 (C.A. 7, 1968) (promotion upon restoration); Diehl v. Lehigh Valley R. Co.,

(Footnote cont'd)

are just a crude means of measuring rewards for longevity." Id. The vacation pay here is thus a perquisite of seniority.

II

PLAINTIFFS ARE ENTITLED TO SICK LEAVE CREDIT FOR THEIR MILITARY SERVICE.

In addition to claiming vacation pay benefits, plaintiffs also seek sick leave credit in their year of return. The only requirement for attainment of the full ten days benefit is that an employee must have "completed at least 1 calendar year of employment."[12/] There is absolutely nothing in the collective bargaining agreement to indicate that there is any work requirement at all.

The court below, which did not even analyze the issue, gave no basis for its holding that these benefits are "earned benefits." The only conclusion that can be drawn from the express language of Article XII, Section A, is that sick leave benefits are granted to employees strictly on the basis of

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11/ (Footnote cont'd) 348 U.S. 960 (1955); Tilton v. Missouri Pacific R. Co., supra; Brooks v. Missouri Pacific R. Co., 376 U.S. 182 (1964); Montgomery v. Southern Electric Steel Co., 410 F. 2d 611 (C.A. 5, 1969); Pomrening v. United Airlines, Inc., 448 F. 2d 609 (C.A. 7, 1971) (seniority position); Hoffman v. Bethlehem Steel Corp., 477 F. 2d 860 (C.A. 3, 1973) (seniority position); Hoffman v. Bethlehem Steel Corp., 477 F. 2d 860 (C.A. 3, 1973) (supplemental unemployment benefits); Accardi v. Pennsylvania R.R. Co., supra; Palmarozzo v. Coca-Cola Bottling Co. of New York, Inc., supra (severance benefits); Eagar v. Magma Copper Co., supra (vacation and holiday pay).

12/ Five of these ten sick days may be taken as vacation time. For employees with less than one calendar year of employment, benefits accrue on a pro rata basis.

continuous service, regardless of time actually worked. As such, it is plain that these are benefits which are perquisites of seniority under the Act. Accardi v. Pennsylvania R. Co., supra; Eagar v. Magma Copper Co., supra.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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JULY 1974

CERTIFICATE OF SERVICE

This is to certify that on this 19th day of July, 1974, I served the foregoing Brief for the Plaintiffs-Appellants upon counsel for the Defendant-Appellee by causing copies to be mailed, postage prepaid, to:

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